Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DENNIS W. RIGGS,

Petitioner,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

I. Whether State Law or Federal Common Law determines the waiver defense to enforceability of a contract to arbitrate?

II. If Federal Common Law determines the waiver defense, whether prejudice to the non-waiving party is an element of the defense?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

Page

Questions Presented.....i

List of Parties.....ii

Table of Contents.....iii

Table of Citations.....vi

Opinion Below.....1

Statement of Jurisdiction.....2

Statutes Involved.....2

Statement of the Case.....2

Reasons for Granting the Writ.....8

I. The Petition should be granted to resolve the conflict between the opinion below and Doctors' Associates, Inc. v. Casarotto, 116 S.Ct. 1652 (1996), Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995), Perry v. Thomas, 482 U.S. 483 (1987), Atherton v. Federal Deposit Ins. Corp., 116 S.Ct. 1587 (1997) and Erie Co. v. Tompkins, 304 U.S. 64 (1938).....8

II. The Petition should be granted, if Federal Common Law determines the waiver defense to enforceability of an arbitration contract, to resolve the conflict between the opinion below and Cabinetree of Wis. v. Kraftmaid Cabinetry, 50 F.3d 388 (7th Cir. 1995), which does not require prejudice to the non-moving party as an element of the waiver defense.....12

Conclusion..... 15
Appendix..... 1a

February 24, 1997 opinion of the United States Court of Appeals in Second Circuit Docket No. 96-7321..... 1a

June 10, 1997 Summary Order of the Second Circuit Court of Appeals in this case, Docket No. 96-7141, affirming the District Court Judgment..... 31a

August 22, 1996 District Court judgment compelling arbitration and permanently enjoining Dennis Riggs from prosecuting his Federal action in Chicago.....34a

August 22,1996 District Court ruling on pending motions ordering Dennis Riggs to arbitrate his claims against DAI in Connecticut and permanently enjoining him from prosecution of his Federal action against DAI, et al. in Chicago.....36a

Questions presented in this and two other Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.....43a

TABLE OF CITATIONS

CASES CITED

Page

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995).....8,10,11,12

Atherton v. Federal Deposit Ins. Co., 116 S.Ct. 1587 (1997).....8,11,12

Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, 50 F.3d 388 (7th Cir. 1995).....6,12,14

Doctor's Associates, Inc. v. Casarotto, 116 S.Ct. 1652 (1996).....8,10,11,12

Doctor's Associates, Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995).....6

Doctor's Associates, Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997).....8,13

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).....8,11,12

Foster v. Foster, 273 Ill.App. 106, 652 N.E.2d 350, 209 Ill.Dec. 810 (Ill.App. 1995).....3,4

Kennedy v. Commercial Carriers, Inc., 258 Ill.App.3d 939, 630 N.E.2d 1059 (Ill.App. 1994).....7

Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20 (2d Cir.1995).....6

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983).....9

Northern Trust Co. v. Oxford Speaker Co., 109 Ill.App. 3d 433, 440 N.E.2d 968, 65 Ill.Dec. 113 (Ill.App.1982).....6,7

Perry v. Thomas, 482 U.S. 483 (1987).....8,10,11,12

Pierce v. McNeil Memorial Hospital Association, 360 N.E.2d 551 4 Ill.Dec. 615 (Ill.App. 1977).....6

Sexton v. Smith, 112 Ill.2d 187, 493 N.E.2d 1284, 97 Ill.Dec. 411 (Ill.1986).....6

Southland Corp. v. Keating, 465 U.S. 1 (1984).....9,10

Worldsource Coil Coatings, Inc. v. McGraw Constr. Co., Inc., 946 F.2d 473 (6th Cir. 1991).....7

Yates v. Doctor's Associates, Inc., 193 Ill.App. 431, 549 N.E.2d 1010 (Ill.App. 1990).....7

STATUTES CITED

Page

28 U.S.C. §1254(1).....2

815 ILCS 705/26.....4,5

815 ILCS 705/1.....14

815 ILCS §505/1.....4

9 U.S.C. §1.....9

TREATISES

Restatement of Contracts, Second, §211.....3

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DENNIS W. RIGGS,

Petitioner,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dennis W. Riggs, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix at 31a-34a. The unreported judgment and rulings on motions of the District Court are reproduced in the Appendix at pages 34a-42a.

STATEMENT OF JURISDICTION

The Court of Appeals entered the judgment on June 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

None

STATEMENT OF THE CASE

Dennis W. Riggs is a citizen and resident of Illinois who operated a Subway Sandwich Shop franchise in the suburbs of Chicago pursuant to a franchise agreement with Doctors' Associates, Inc. ("DAI"). The franchise agreement specifies the law of Illinois.

DAI requires all its franchisees to sign a sub-lease with one of its assetless, alter ego, leasing companies which in turn enters into a master lease with the landlord for each Subway Shop location. The franchisee, sub-lessee, pays the rent directly to the landlord, bypassing the leasing company. The rent under the sub-lease and master lease is the same. The franchise agreements contain an arbitration clause requiring arbitration as a condition precedent to litigation by either party. The sub-leases do not have an arbitration clause but do have a cross-default provision which renders any breach of the franchise agreement by the franchisee, sub-lessee, a breach of the sub-lease.

In this fashion DAI litigates its claims against its franchisees through eviction actions filed by its alter ego, assetless, leasing companies under the cross-default provision in the sub-lease, while requiring the franchisees to arbitrate their claims against DAI in Connecticut.

The Illinois State Courts have repeatedly held these arbitration clauses void and unenforceable on grounds of waiver, lack of mutuality, unconscionability, failure to meet the reasonable expectations of the parties under Restatement of Contracts, Second, §211 and on public policy grounds. DAI has avoided enforcement of these Illinois State judgments by filing petitions to compel arbitration in the Federal Court in Connecticut which has repeatedly ignored the prior State Court judgments and held the arbitration clauses valid and enforceable while compelling arbitration and enjoining the Illinois State actions.

On May 31, 1996 DAI's alter ego, assetless, leasing company, Subway Central, Inc. filed a complaint for forcible entry and detainer against Dennis Riggs in the Circuit Court of Cook County, Illinois, claiming violations of the sub-lease and the franchise agreement through the cross-default provision in the sub-lease. Subway Central, Inc. subsequently amended the complaint to allege only breaches of the sub-lease.

Illinois law does not permit counterclaims for monetary damages in eviction actions. Foster v.

Foster, 273 Ill.App.106, 652 N.E.2d 350, 209 Ill.Dec. 810, 815 [16] (Ill.App. 1995). The Second Circuit found it significant that the Illinois franchisees did not file their claims against DAI as counterclaims in the eviction actions. App. 17a. The Second Circuit initially stated that the eviction actions against the Illinois franchisees were simple collection proceedings for small amounts, App. 17a, then acknowledged that a number of the Illinois franchisees lost their franchise stores and their entire investment, as a result of the eviction proceedings. App. 18a.

On June 18, 1996 Dennis Riggs filed his complaint against DAI, Subway Restaurants, Inc., Subway Central, Inc., Frederick DeLuca and Peter Buck in the United States District Court for the Northern District of Illinois for a declaratory judgment that DAI had waived the right to compel arbitration by filing the eviction action, for damages under the Illinois Franchise Disclosure Act, 815 ILCS 705/26, for recision of the franchise agreement under the Illinois Franchise Disclosure Act, for damages under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS §505/1 et seq. and for damages for common law fraud.

On July 11, 1996 DAI filed its Petition to Compel Arbitration in the United States District Court for Connecticut along with a motion for a preliminary injunction to enjoin Dennis Riggs from further prosecution of his Chicago federal action. DAI stipulated that it controlled the decision to file and prosecute the eviction action in the name of

Subway Central, Inc. and/or Subway Restaurants, Inc.

During July, 1996, Dennis Riggs filed a motion for a preliminary injunction in the Chicago federal action to enjoin DAI from further prosecution of the Connecticut federal action. That motion was denied.

On August 22, 1996 the Connecticut Federal Court entered judgment compelling arbitration and permanently enjoining Dennis Riggs from further prosecution of his Chicago Federal action against any of the Defendants there.

Since then the eviction action by Subway Central, Inc. against Dennis Riggs has continued to proceed. In response to a request for clarification by Dennis Riggs to the Connecticut District Court, an order was entered there precluding Dennis Riggs from raising as a defense, in the eviction action, any claims relating to the franchise agreement, which is inextricably intertwined with the sub-lease. Dennis Riggs abandoned the premises. Subsequently judgment was entered against him in the eviction action for damages in the sum of approximately $16,000.00. He has appealed that decision to the Illinois Court of Appeals. He has also appealed the decision of the Connecticut Federal Court preventing him from raising as a defense in the eviction action his defenses relating to the franchise agreement, including the right to recision of the franchise agreement under the Illinois Franchise Disclosure Act, 815 ILCS §705/26.

Under Federal Common Law according to the Second Circuit, the waiver defense to enforcement of an arbitration contract requires proof of prejudice to the non-waiving party. Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20 (2d Cir. 1995), Doctor's Associates, Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995).

Under Federal Common Law according to the Seventh Circuit, neither consideration to the waiving party nor prejudice to the non-waiving party are elements of the waiver defense to enforceability of arbitration contracts. Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, 50 F.3d 388 (7th Cir. 1995).

Illinois State Law for the waiver defense to enforcement of any contract, including but not limited to arbitration contracts, requires an intentional relinquishment of a known right, but does not require prejudice to the non-waiving party. Under Illinois Law prejudice is an element of the equitable estoppel defense to enforcement of a contractual right, but not the waiver defense. Pierce v. McNeil Memorial Hospital Association, 360 N.E.2d 551, 559[13], 4 Ill.Dec.615, 623[13] (Ill.App. 1977). Under Illinois Law waiver of a contractual right may be express or implied and may arise from the acts, words or conduct of the one waiving the right. Sexton v. Smith, 112 Ill.2d 187, 493 N.E.2d 1284, 1287[3], 97 Ill.Dec.411, 414[3] (Ill. 1986). In Northern Trust Co. v. Oxford Speaker Co., 109

Ill.App.3d 433, 440 N.E.2d 968, 972[3], 65 Ill.Dec. 113, 117[3] (Ill:App. 1982), the Court reversed a summary judgment on the waiver issue, holding that waiver does not require prejudice. Applying the same contract waiver principles to arbitration contracts in the same manner as contracts generally, Illinois law provides that a party waives its contractual right to arbitrate when it submits arbitrable claims to litigation. Kennedy v. Commercial Carriers, Inc., 258 Ill.App. 3d 939, 630 N.E.2d 1059, 1062[2] (Ill.App. 1994), Yates v. Doctor's Associates, Inc., 193 Ill.App. 431, 549 N.E.2d 1010, 1016-17 (Ill.App. 1990) and Worldsource Coil Coatings, Inc. v. McGraw Construction Co., Inc., 946 F.2d 473, 476[1,2] (6th Cir. 1991), applying Illinois law.

Under Illinois law, which is specified in the franchise agreement, DAI waived its right to compel arbitration when it filed the eviction action against Dennis Riggs in the name of its alter ego, assetless, leasing company, Subway Central, Inc. Yates v. Doctors' Associates, Inc., 193 Ill.App.3d 431, 549 N.E.2d 1010, 1016-17 (Ill.App.1990).

In the Connecticut Federal Court Dennis Riggs argued that the waiver defense to enforcement of the arbitration agreement was governed by Illinois State Law, not Federal Common Law. The Connecticut District Court disagreed, applying Federal Common law to the waiver defense. App. 38a-40a.

The petitioner and other Subway franchisees have filed three separate petitions for writs of certiorari arising from two Second Circuit cases argued in tandem, resulting in an opinion in one and dismissal of the other on February 24, 1997 and the subsequent summary opinion issued in this case on June 10, 1997 based, in large part, on the February 24, 1997 opinion. The questions presented by these three separate petitions for writs of certiorari are set forth in the appendix. App. 43a-44a.

While the three petitions for writs of certiorari arise from three cases which are somewhat related, the questions presented in each petition are separate and distinct.

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted to resolve the conflict between the opinion below and Doctors' Associates, Inc. v. Casarotto, 116 S.Ct. 1652 (1996), Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995), Perry v. Thomas, 482 U.S. 483 (1987), Atherton v. Federal Deposit Ins. Corp., 116 S.Ct. 1587 (1997) and Erie Co. v. Tompkins, 304 U.S. 64 (1938).

The franchisees also argued that State Law, not Federal Common Law, governs the waiver defense to enforcement of the arbitration contracts in Doctor's Associates, Inc. v. Distajo, et al., 107 F.3d

126 (2d Cir. 1997). There the Second Circuit held that the franchisees "apparently" waived the argument that State Law governs this defense. App. 11a. The Second Circuit proceeded to rule, however, that the Federal Arbitration Act creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act", citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S.1, 24-25 (1983). App. 11a.

The Second Circuit cited Doctor's Associates, Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997) and the Connecticut District Court decision below in the Summary Order affirming the Connecticut District Court. App. 31a-33a.

Dennis Riggs respectfully submits that the anticipation of the court in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) that a body of substantive federal law would develop with respect to the enforceability of arbitration contracts has clearly been superceded by subsequent Supreme Court opinions in 1984 and thereafter.

In 1984 the Supreme Court determined that the Federal Arbitration Act, 9 U.S.C. §1 et seq. was not a Federal Procedural Statute, but substantive law which applied in the State Courts, Southland Corp. v. Keating, 465 U.S. 1, 21-36 (1984).

At the time Moses Cone was decided in 1983 an open issue existed as to whether the Federal Arbitration Act was a Federal Procedural Statute which applied only in the Federal Courts or constituted substantive law which applied in both Federal and State Courts. The language in Moses Cone that the Court anticipated the development of a body of Federal substantive law determining rights under the Federal Arbitration Act was clearly dicta, anticipating future development of the law.

Beginning with Southland v. Keating in 1984, the law developed in a manner not completely anticipated by the Court in Moses Cone. First, the Court determined that the Federal Arbitration Act was not merely a Federal Procedural Statute, but constituted substantive law which applied in both State and Federal Courts. Southland v. Keating, 1984. Next, the Court concluded that the purpose of the Federal Arbitration Act was to insure that arbitration contracts were placed on the same footing as other contracts generally. In 1987, 1995 and 1996 the Court concluded that State Law determined contract defenses to the enforceability, validity and revocability of arbitration contracts, so long as State Law applied to arbitration contracts in the same fashion that it applied to contracts generally. Perry v. Thomas, 482 U.S. 483, 492, n.9 (1987), Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 2645, 115 S.Ct. 834, 843, 130 L.Ed.2d 753 (1995) and Doctor's Associates, Inc. v. Casarotto, ____ U.S. ____, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996).

Since determining that the Federal Arbitration Act was a substantive, not Procedural, Statute, the Court has applied the principles of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

Since the Federal Arbitration Act does not confer independent Federal jurisdiction, each Federal case requires an independent source of Federal jurisdiction. In all Federal cases involving Subway franchisees, including Dennis Riggs, DAI relies upon diversity jurisdiction.

The rule of Perry v. Thomas, Allied-Bruce Terminix Cos. v. Dobson and Doctor's Associates, Inc. v. Casarotto, that State Law determines the enforceability, validity and revocability of arbitration contracts, so long as it applies equally to arbitration contracts and contracts generally is consistent with the Court's ruling in Atherton v. Federal Deposit Ins. Corp., ____ U.S. ___, 116 S.Ct. 1587, 134 L.Ed.2d 684 (1997), that a general Federal Common Law does not exist, that special Federal rules may be developed only when a significant conflict exists between some federal policy or interest and the use of State Law, and that such conflict must be specifically shown as a precondition to the application of a Federal rule instead of State Law. Atherton v. FDIC was premised upon Erie R. Co. v. Tompkins.

Here the Federal policy or interest is to place arbitration contracts on the same footing as other contracts, generally. State Law, not Federal

Common Law, determines the contract defenses to enforceability, validity and revocability of the arbitration contracts so long as State Law applies equally to arbitration contracts and other contracts generally.

Illinois Law applies the contract waiver defense to arbitration contracts in the same fashion as other contracts, generally. Waiver is the intentional relinquishment of a known right under the Law of Illinois. That standard applies to arbitration contracts as well as other contracts generally. Prejudice to the non-waiving party and consideration to the waiving party are not elements of the defense in Illinois.

The decisions of the Connecticut District Court and the Second Circuit Court of Appeals conflict squarely with Erie R. Co. v. Tompkins, Atherton v. Federal Deposit Inc. Corp, Perry v. Thomas, Doctor's Associates, Inc. v. Casarotto and Allied-Bruce Terminix Cos. v. Dobson.

The petition should be granted to resolve this conflict.

II. The Petition should be granted, if Federal Common Law determines the waiver defense to enforceability of an arbitration contract, to resolve the conflict between the opinion below and Cabinetree of Wis. v. Kraftmaid Cabinetry, 50 F.3d 388 (7th Cir. 1995),

which does not require prejudice to the non-moving party as an element of the waiver defense.

The decisions of the Connecticut District Court and the Second Circuit Court of Appeals below provide that Federal Common Law determines the waiver defense to enforceability of the arbitration contract, even though the Supreme Court has previously decided that all other defenses to the enforceability and validity of arbitration contracts, such as unconscionability, fraud and duress are governed by State Law so long as State Law applies equally to arbitration contracts and other contracts generally.

There is no rational basis for carving out an exception for the waiver defense to enforceability of arbitration contracts. The rationale for applying State Law to the unconscionability, fraud and duress defenses to enforceability and validity of the arbitration contracts applies equally to the waiver defense.

If this Court should determine, however, that the waiver defense is governed by Federal Common Law, not State Law, a conflict exists between the Second and Seventh Circuits on this defense.

The Second Circuit holds that prejudice to the non-moving party is an element of the waiver defense to enforceability of the arbitration contract.

Doctor's Associates, Inc. v. Distajo, et al., 107 F.3d 126, 131 (2nd Cir. 1997), App. 11a.

On the other hand, the Seventh Circuit, applying Federal Common Law, holds that prejudice to the non-waiving party and consideration to the waiving party are not elements of the waiver defense to enforceability of arbitration contracts. Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th Cir. 1995). There the Court held that a franchisor, sued in State Court, which removed the case to the Federal Court before moving to compel arbitration, waived its right to compel arbitration.

In the alternative to Dennis Riggs' position that State Law not Federal Common Law applies, it is imperative that this Court resolve this conflict.

The Seventh Circuit sits in Illinois, the franchise agreement specifies the Law of Illinois and Dennis Riggs resides in Illinois and operated his Subway franchise shop there under an agreement governed by the Illinois Franchise Disclosure Act, 815 ILCS §705/1 et seq.

There is no logical reason for Federal common law, according to the Second Circuit, to control this case when it so clearly conflicts with Federal common law according to the Seventh Circuit.

The Petition should be granted to resolve this conflict.

CONCLUSION

For the reasons stated, the Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 302—August Term 1996

Argued: November 4, 1996 Decided: February 24, 1997

Docket No. 96-7321

DOCTOR'S ASSOCIATES, INC.,

Plaintiff-Appellee,

—against—

EMILY DISTAJO, et al.,

Defendants-Appellants.

Before:

FEINBERG, LEVAL and PARKER,

Circuit Judges.

Appeal from orders entered in the United States District Court for the District of Connecticut, Peter C. Dorsey, Chief Judge, granting petitions by plaintiff Doctor's Associates, Inc. (DAI) to compel arbitration of state-court claims brought by defendants Subway fran-

chisees and enjoining defendants from further prosecuting their state suits. The Second Circuit, Feinberg, J., held that: (1) the district court did not err in denying defendants' motion for a jury trial under 9 U.S.C. § 4; (2) DAI did not waive its right to arbitrate by bringing eviction actions against defendants; (3) DAI did not fraudulently induce the arbitration agreement; (4) the arbitration agreement is not unconscionable; (5) the district court did not abuse its discretion by entering two preliminary injunctions without requiring DAI to post bonds; (6) the district court had personal jurisdiction over the Kanchwala defendants; (7) the *Rooker-Feldman* doctrine did not bar jurisdiction over DAI's petitions to compel arbitration; and (8) the district court did not abuse its discretion in refusing to abstain from exercising jurisdiction over the Bickels. Affirmed.

DAVID M. DUREE, St. Louis, MO (Reinert & Duree, P.C.; Nicholas Wocl, Stamford, CT, Tooher, Puzzuoli & Wocl, Co-Counsel), *for Defendants-Appellants.*

EDWARD WOOD DUNHAM, New Haven, CT (Wiggin & Dana, Mark R. Kravitz, of Counsel), *for Plaintiff-Appellee.*

FEINBERG, Circuit Judge:

Plaintiff-appellee Doctor's Associates, Inc. (DAI), a Florida corporation, is the national franchisor of "Subway" sandwich shops. Defendants-appellants, present and former Subway franchisees, appeal from orders of

the United States District Court for the District of Connecticut, Peter C. Dorsey, Chief Judge, dated February 14, 1996, and March 14, 1996, both published at 944 F. Supp. 1010 (D.Conn. 1996), granting petitions by DAI to compel arbitration of claims the franchisees filed against DAI in various state courts. (The term "the franchisees" is used in this opinion to designate those Subway franchisees who brought state court actions against DAI and were named below as respondents in DAI's petitions to compel arbitration.) For reasons set forth below, we affirm. In a related appeal, No. 96-7011, defendants also challenge the district court's preliminary injunction dated January 3, 1996, enjoining them from prosecuting their state suits against DAI. By separate order filed today, we dismiss that appeal as moot.

We are not the first panel of this court to encounter an appeal by groups of Subway franchisees, represented by attorney David M. Duree, involving similar—if not identical—facts and legal issues regarding arbitration of disputes with DAI. We have already remanded once in this case, Doctor's Associates, Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995), cert. denied, 116 S. Ct. 1352 (1996) (*Distajo I*), and two other panels have since affirmed orders granting DAI's petitions to compel arbitration of claims by other Subway franchisees. Doctor's Associates, Inc. v. Stuart, 85 F.3d 975 (2d Cir. 1996); Doctor's Associates, Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996). At least one other appeal is pending in this court from a decision compelling franchisees to arbitrate disputes with DAI. Doctor's Associates, Inc. v. Riggs, No. 96-9141 (argument not yet scheduled). The parties have also waged battles in various other courts across the country. See Distajo I, 66 F.3d at 441 n.1 (listing other DAI/franchisee litigation). After the franchisees submitted their

initial brief in this appeal, we issued our opinion in *Stuart*, which, as discussed below, controls some of the legal issues raised in this appeal. Our decision today resolves several other legal issues in this bitter litigation.

I. Facts and Prior Proceedings

When purchasing franchises from DAI, each franchisee-defendant[1] executed a standard franchise agreement which requires the parties to arbitrate claims arising under the agreement.[2] Most of the franchise agreements state that they are governed by Connecticut law. Each franchisee-defendant also entered into a standard sublease with a leasing company affiliated with DAI. The sublease, which does not contain an arbitration clause, includes a "cross-default" provision, which allows the leasing company to evict a franchisee

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[1] This appeal involves numerous individual cases, each brought by the franchisees from a particular Subway store: Doctor's Associates, Inc. v. Distajo, No. 3:94-CV-349; Doctor's Associates, Inc. v. Brenes, No. 3:94-CV-511; Doctor's Associates, Inc. v. Guerrero, No. 3:94-CV-514; Doctor's Associates, Inc. v. Youmaran, No. 3:94-CV-515; Doctor's Associates, Inc. v. Shino, No. 3:94-CV-516; Doctor's Associates, Inc. v. Loennecke, No. 3:94-CV-517; Doctor's Associates, Inc. v. Johnson, No. 3:94-CV-803; Doctor's Associates, Inc. v. Kane, No. 3:94-CV-948; Doctor's Associates, Inc. v. Gianinni, No. 3:94-CV-1108; Doctor's Associates, Inc. v. Rothmund, No. 3:94-CV-1456; Doctor's Associates, Inc. v. Papaleo, No. 3:94-CV-1457; Doctor's Associates, Inc. v. Bickel, No. 95-CV-120; Doctor's Associates, Inc. v. Kanchwala, No. 95-CV-1915.

[2] The clause provides, in relevant part, that:

> [a]ny controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. . . .

for violations of either the sublease *or* the franchise agreement.[3]

Between 1991 and 1993, many disputes arose between DAI and the franchisees regarding rents, royalties and advertising fees due under the franchise agreements and subleases. To recover these monies, DAI instructed its leasing companies to file eviction actions, primarily in Illinois state court, against certain franchisees. In addition, all franchisees except the Kanes and Bickels claim that DAI routinely threatened to bring such eviction proceedings to recover alleged unpaid fees and rents.

Several months to one year after the close of these eviction proceedings, each franchisee filed a nearly identical action against DAI in state court in either Illinois, Pennsylvania, Massachusetts or North Carolina. Each suit alleged, among other things, (1) fraud with respect to DAI's policies of operating through assetless leasing companies, avoiding arbitration through use of eviction proceedings, and withholding business information from franchisees, (2) breach of contract for DAI's failure to arbitrate the disputes underlying the eviction actions, and for various unrelated violations of the franchise agreements, and (3) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, the Illinois Franchise Disclosure Act and the Lanham Act. Each franchisee requested compensation and substantial punitive damages.

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[3] The sublease provides, in relevant part, that:

> If at any time during the term of this Sublease, Sublessee shall default in the performance of any of the terms, covenants or conditions of the aforesaid Franchise Agreement . . . Sublessor, at its option, may terminate this lease . . . and upon such termination, Sublessee shall quit and surrender the leased premises to the Sublessor, but Sublessee shall remain liable for the balance of the rent due as provided in this Sublease.

Upon notice of each case filed by a franchisee, DAI immediately filed a written demand for arbitration with the American Arbitration Association in accordance with that body's Commercial Arbitration Rules (AAA Rules). When defendants refused to arbitrate their disputes, DAI filed the present petitions to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 4. The franchisees conceded that their claims in state court raise arbitrable issues under the arbitration clause in the franchise agreements. However, they argued, among other things, that DAI fraudulently induced the arbitration clause and that DAI waived its right to arbitrate by filing or threatening to file the prior eviction actions.

In November 1994, the district court granted most of DAI's petitions to compel arbitration.[4] It rejected the franchisees' arguments that the arbitration agreement was void for lack of mutuality or as a contract of adhesion, that the agreement was unconscionable, and that DAI had waived its right to arbitrate. The court also held that the franchisees' defense of fraudulent inducement should be decided by the arbitrator. By order dated December 9, 1994, the court enjoined the franchisees from prosecuting their state court actions, in order to effectuate the judgment compelling arbitration, see 28 U.S.C. § 2283.

The franchisees appealed both orders to this court. In September 1995, we issued an opinion (Distajo I) affirming and reversing in part. We upheld the district court's rulings (1) that it had subject matter (diversity) jurisdiction, (2) that judgments the franchisees had obtained against DAI in their Illinois and North Carolina state

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[4] The district court granted DAI's petitions to compel arbitration of claims brought by the Bickels and Kanchwalas in February 1995 and March 1996, respectively.

suits were not entitled to preclusive effect, and (3) that the arbitration clause was not void for lack of mutuality. On the other hand, we vacated the district court's ruling rejecting the franchisees' waiver defense to arbitration and instructed that on remand the district court should determine whether (1) "the leasing companies were mere alter egos of DAI," (2) "prosecution of those eviction actions constituted litigation of 'substantial issues going to the merits,' " and (3) "the franchisees suffered prejudice from the eviction proceedings." We also held that on remand, the district court—rather than the arbitrator—should determine whether DAI fraudulently induced the arbitration clause. Finally, we vacated the preliminary injunctions.

After the district court conducted further proceedings on remand, it filed opinions on February 14 and March 14, 1996, again granting DAI's petitions to compel arbitration. The court held that (1) the franchisees had not submitted sufficient evidentiary facts to entitle them to a jury trial on their defenses to arbitration, 944 F. Supp. at 1013-14, 1015-16, (2) DAI had not waived its right to arbitrate by bringing or threatening to bring eviction proceedings, id. at 1018-22, (3) DAI had not fraudulently induced the arbitration clause, id. at 1017-18, and (4) there was no reason for the district court to abstain based on the franchisees' state court litigation, id. at 1022-23. The franchisees challenge all of these rulings, and raise the additional arguments that (1) issues of fact remain with respect to their defenses that the arbitration clause is unconscionable and fails to meet their reasonable expectations, (2) the district court erred by entering preliminary injunctions on January 3 and March 14, 1996, without requiring DAI to post bonds, (3) the district court lacked subject matter jurisdiction to compel

arbitration, and (4) the district court lacked personal jurisdiction over the Kanchwalas.

II. Demand for a Jury Trial

The franchisees argue that the district court erred in denying them a jury trial under 9 U.S.C. § 4 on their defenses of fraud, waiver, unconscionability and failure of the contract to meet their reasonable expectations. In February 1996, the district court granted DAI's motion to forgo trial and decide these issues as a matter of law, finding that the franchisees had not shown that material facts were in dispute with respect to their defenses of fraud and waiver.[5] 944 F. Supp. at 1013-15. The franchisees then filed additional affidavits purportedly substantiating these defenses, and moved for reconsideration. In March, the district court denied that motion, observing that the franchisees had waited five to 23 months from the time DAI filed its petitions to submit such affidavits. Id. at 1016. Nevertheless, the court agreed to consider the facts alleged in their "belated" affidavits in ruling on their defenses as a matter of law. Id.

Although a party may demand a jury trial when issues respecting arbitrability are "in issue," 9 U.S.C. § 4, we have cautioned that "[a] party resisting arbitration . . . 'bears the burden of showing that he is entitled to a jury trial.' " Stuart, 85 F.3d at 983 (citing Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992)). As when opposing a motion for summary judgment under Fed.R.Civ.P. 56, the party requesting a jury trial must "submit evidentiary facts showing

[5] As discussed in Part V below, defendants did not submit the issues of unconscionability and failure of the contract to meet their expectations to the district court at that time.

that there is a dispute of fact to be tried." Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 358 (2d Cir. 1995); Stuart, 85 F.3d at 983-84 (party must demonstrate a "genuine" issue); see Manning v. Energy Conversion Devices, Inc., 833 F.2d 1096, 1103 (2d Cir. 1987).

Even after conducting discovery on their defenses, the franchisees have failed to satisfy this burden. The district court diligently complied with our direction in *Distajo I* that it "consider[ ]" the franchisees' jury demands. 66 F.3d at 456 n.13. As discussed separately below, the franchisees have not shown, even in their most recent affidavits, that material facts are in dispute regarding their fraud and waiver defenses. Moreover, by submitting the bulk of their affidavits at the last minute, the franchisees utterly failed to "alert [the] district court[ ] promptly and fully" to the facts underlying these claims. Manning, 833 F.2d at 1103. We thus affirm the district court's decision to proceed without a jury trial and rule on the defenses as a matter of law.

III. Waiver of the Right to Compel Arbitration

All the franchisees except the Bickels and Kanes argue that DAI waived its right to compel arbitration of their state-court claims based on DAI's conduct in connection with prior litigation proceedings. Specifically, DAI obtained judgments of eviction against certain franchisees.[6] 944 F. Supp. at 1019-20. Brenes, the Rothmunds and the Kanchwalas all lost their franchises as a result of these eviction proceedings. Eviction actions against another group of franchisees[7] were dismissed at

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[6] Jose Brenes, Wesam and Linda Youmaran, Ronald and Patricia Rothmund, and Michael and Anver Kanchwala and Azim Hemani.

[7] Emily and Renato Distajo and Constantine and Milo Lamando, Alvaro and Maria Guerrero, Bruno Giannini, and John Papaleo. DAI dis-

an early stage because, under state law, DAI's unregistered leasing companies could not file lawsuits in the relevant states. Id. DAI has never filed eviction proceedings against a third group of franchisees.[8] Id. at 1019. However, the franchisee-defendants (except the Kanes and Bickels) allege that DAI routinely threatened them with eviction in order to resolve its claims under the franchise agreements and subleases. The district court found that there were no material issues of fact in dispute, and held that as matter of law DAI did not waive its right to compel arbitration of franchisees' claims. 944 F. Supp. at 1020-22. We agree.

We review de novo the issue whether a party waived its right to compel arbitration. Stuart, 85 F.3d at 981 (citing Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995)). "The factual determinations upon which to base the waiver determination, however, will not be reversed unless clearly erroneous." Stuart, 85 F.3d at 981. Because of the strong federal policy favoring arbitration, courts resolve doubts as to whether waiver occurred in favor of arbitration. Id. (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). In *Stuart*, we cautioned that "[t]he waiver determination must be based on the circumstances and context of the particular case, 'with a healthy regard for the policy of promoting arbitration.' " Stuart, 85 F.3d at 981 (quoting Leadertex, 67 F.3d at 25)).

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missed the action against Papaleo, who abandoned his store and ceased operation as a Subway franchisee for financial reasons while the eviction action was pending.

[8] Julie and Johnson Shino and Albert and Laylan Yonan, Louis Loenneke and Mary Ann Bookout, Michael Johnson, Gregory and Deborah Kane, and Raymond and Sandra Bickel.

On appeal, the franchisees make an elaborate argument that either Illinois or Connecticut law should apply, or at least "have some significance," on the waiver issue. However, they apparently waived this choice-of-law argument by not raising it in the district court. In any event, the Supreme Court has held that the FAA creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses Cone, 460 U.S. at 24; National Union Fire Co. of Pittsburgh v. Belco Petroleum Corp., 88 F.3d 129, 133 (2d Cir. 1996); see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos, 553 F.2d 842, 845 n.4 (2d Cir. 1977) (applying federal law to waiver issue). The franchisees do not contest that the FAA applies to this dispute, nor could they because the franchise agreements between DAI, a Florida corporation, and franchisees from various other states "evidence[ ] a transaction involving commerce." 9 U.S.C. §§ 1, 2; Allied-Bruce Terminex Comps. v. Dobson, 115 S. Ct. 834, 840-41 (1995) (§ 2's "involving commerce" standard reaches to limits of Commerce Clause power). As we recently explained, even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue. See Belco, 88 F.3d at 134-35 (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1217-19 (1995)).

We have often stated the general rule that waiver of the right to arbitrate occurs when a party "engages in protracted litigation that results in prejudice to the opposing party." Cotton v. Slone, 4 F.3d 176, 179 (2d Cir. 1993) (citing Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991)); Sweater Bee By Banff, Ltd. v.

Manhattan Indus., 754 F.2d 457, 461 (2d Cir. 1985) ("[L]itigation of substantial issues going to the merits may constitute a waiver of arbitration."). The "prejudice" that supports a finding of waiver can be "substantive" prejudice to the legal position of the party opposing arbitration, such as when the party seeking arbitration "loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration," Kramer, 943 F.2d at 179, or obtains information through discovery procedures not available in arbitration, Cotton, 4 F.3d at 179. Additionally, we have held that a party may be prejudiced by the "unnecessary delay or expense" that results when an opponent delays invocation of its contractual right to arbitrate. Id. (citing Kramer, 943 F.2d at 179).

Initially, we must determine the effect of our opinion in *Distajo I* on resolution of the franchisees' waiver arguments. DAI argues on appeal that, in the eviction proceedings, it did not litigate "substantial issues going to the merits" of the franchisees' current claims. The franchisees vigorously contend that the doctrine of "law of the case" prevents our reaching this argument because we stated in *Distajo I* that

> [i]f the alleged violations of the subleases were premised on violations of the franchise agreement (which DAI was contractually bound to resolve through arbitration) then DAI did litigate substantial issues going to the merits, and the only remaining question will be whether the franchisees suffered prejudice from the eviction proceedings.[9]

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[9] Except with respect to the Kanchwalas, both parties agree that the eviction actions were premised, at least in part, on violations of the franchise agreements. We also held in *Distajo I* that waiver could only apply if "DAI was responsible for the eviction proceedings" brought by its

Distajo I, 66 F.3d at 457. The district court rejected the franchisees' waiver defense solely on the ground that they had not proven sufficient prejudice. 944 F. Supp. at 1019-21.

We do not believe we are so constrained. The doctrine of "law of the case" instructs that " 'if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case.' " Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996) (citing DiLaura v. Power Authority of State of New York, 982 F.2d 73, 76 (2d Cir. 1992)). However, the doctrine "is, at best, a discretionary doctrine, which does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided." United States v. Martinez, 987 F.2d 920, 923 (2d Cir. 1993) (citations and internal quotations omitted). For instance, a court may properly reconsider a prior statement of law when new evidence indicates that its prior view was unsound. See Sagendorf-Teal, 100 F.3d at 277.

In *Distajo I*, responding to two issues raised by the district court's November 1994 order compelling arbitration, we focused on (1) the relationship between DAI and the leasing companies that filed the eviction proceedings, and (2) whether the court or the arbitrator should rule on defendants' waiver defense. After a thorough discussion of the latter issue, we held that the district court should decide whether DAI had waived arbitration. 66 F.3d at 453-56. We apparently assumed that the franchisees brought their state suits in direct response to DAI's eviction actions, and that their state suits and the eviction actions raised identical issues.

leasing companies. 66 F.3d at 457. DAI has since stipulated to responsibility for such actions.

However, DAI argues—without contradiction from the franchisees—that neither the parties nor the court focused in that appeal on the similarity (or lack thereof) of the issues raised in DAI's eviction actions and the franchisees' state suits. This factor is, of course, significant in considering whether DAI litigated "substantial issues going to the merits" of the claims it now seeks to arbitrate. In view of our clearer understanding now, after remand, of the nature and scope of prior litigation by DAI, it would serve no justifiable purpose to adhere blindly to a statement in *Distajo I* that was based on an incomplete picture of the relevant facts.[10] Cf. Cotton, 4 F.3d at 179 (waiver "necessarily depends upon the facts of the particular case"). We thus feel compelled to explore more fully whether DAI engaged in the type of prior litigation which results in waiver of its right to arbitrate.

First, we can easily dispose of the argument that DAI waived its right to arbitrate claims brought by franchisees against whom DAI never instituted eviction proceedings. In *Stuart*, we held that DAI "obviously" had not waived its right to arbitrate claims brought by franchisees against whom DAI had never instituted " 'particular eviction proceedings.' " Stuart, 85 F.3d at 982. The franchisees nevertheless insist that waiver occurred when, unlike in *Stuart*, DAI *threatened* certain franchisees with eviction, allegedly to "extort" payments from them. However, mere threats of litigation do not even constitute "litigation," and thus certainly cannot be considered "substantial litigation on the merits" for waiver analysis. Cf. Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1165 (5th Cir. 1987) (state-

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[10] We note that this panel includes a member of the panel in *Distajo I*.

ment suggesting party would not arbitrate did not "constitute *action* inconsistent with arbitration").

The remaining franchisees' waiver defenses also fail. We first note that the district court found that DAI's eviction actions against certain franchisees (listed above) were dismissed at an early stage, before any adjudication of the merits occurred.[11] 944 F. Supp. at 1019-20. DAI's participation in these suits did not constitute "protracted" litigation, which could result in a waiver of its right to arbitrate. Compare Leadertex, 67 F.3d at 26 (waiver when defendant engaged in "energetic pursuit of discovery" for seven months and requested arbitration "at the eleventh hour" before trial), and Cotton, 4 F.3d at 179-80 (waiver when defendant "actively litigated" dispute by taking depositions and making substantive motions), with Lecopulos, 553 F.2d at 845 (filing an action does not waive arbitration, at least until opponent "has answered on the merits").

In any event, we hold that DAI did not waive its right to arbitrate because in none of the eviction proceedings—even those four actions in which DAI won judgments of eviction—did DAI engage in litigation on the merits of the issues now raised in the franchisees' state suits. DAI persuasively argues that

> [t]here is no conceivable policy justification for a rule that, by exercising the reasonable business judgment to sue to evict someone from leased premises or to collect a debt of less than $10,000, a

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[11] The district court found that in the eviction action against the Kanchwala defendants, DAI claimed only unpaid rent due under the sublease, a non-arbitrable issue. 944 F. Supp. at 1020. The district court correctly held that litigation of non-arbitrable claims does not waive a party's right to arbitrate other, arbitrable claims. Sweater Bee, 754 F.2d at 463; Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 862 (2d Cir. 1985).

> party waives for all time its right to arbitrate every other dispute imaginable, including multimillion dollar punitive damage claims of which the party has no knowledge when it files the eviction action.

Moreover, our prior decisions do not compel a finding of waiver here. If anything, they support the view that only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate. In Gilmore v. Shearson/Am. Express, Inc., 811 F.2d 108 (2d Cir. 1987), we clearly suggested that defendant Shearson's explicit waiver of its right to arbitrate certain claims would not necessarily waive arbitration of other claims raised in an amended complaint filed after Shearson agreed to this waiver. Id. at 113. We held that because the amended complaint did not "alter the scope or theory" of the claims as to which Shearson had already waived arbitration, Shearson could not renounce its waiver and compel arbitration. Id. at 114; cf. Kramer, 943 F.2d at 178 (waiver based in part on party's prior litigation in an "identical" suit); Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 122 (2d Cir. 1991) (no waiver when prior litigation was brought by a separate party and involved "legally distinct claims").

Other circuits seem to agree that waiver can only occur when a party has previously litigated the same claims it now seeks to arbitrate. The Seventh Circuit has held that a franchisor who brought an unlawful detainer action against its franchisee had not waived its right to arbitrate other claims brought by the franchisee—including breach of contract, failure to pay royalties and advertising fees, and several Lanham Act claims—because the two suits "involved different issues." Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 330-332 (7th Cir. 1995); but see

Midwest Window Sys., Inc. v. Amcor Indus., Inc. 630 F.2d 535, 537 (7th Cir. 1980). Similarly, in *Lawrence*, Judge Alvin B. Rubin held that a franchisor, who had previously secured a judgment against a franchisee to recover $5,000 for services provided, had not waived its right to arbitrate subsequent claims by the franchisee that the franchise agreement was illegal and unenforceable. Lawrence, 833 F.2d at 1164-65 (earlier action had not "prejudiced their present claim"). Finding waiver where a party has previously litigated an unrelated yet arbitrable dispute would effectively abrogate an arbitration clause once a party had litigated *any* issue relating to the underlying contract containing the arbitration clause.

The franchisees apparently argue that even under this rule we should find waiver because their current suits and the eviction actions "aris[e] out of the same core facts, i.e., the franchise agreement and franchise relationship." We disagree. According to DAI, the eviction actions were simple collection proceedings to recover relatively small amounts of unpaid fees and rents under the franchise agreements and subleases. The only issues involved in these disputes pertained to whether (and how much) the franchisees owed DAI. In contrast, the franchisees' state suits, filed several months to one year after the evictions, allege various violations by DAI of the franchise agreement and attack the validity of the franchise agreement and arbitration clause on a host of different federal and state law grounds. Significantly, the franchisees did not raise these claims as counterclaims in the eviction actions, nor do they now dispute that they owed the fees and/or rents which DAI sought to collect by filing eviction actions. Thus, the district court properly found that "the disputes involved in the eviction

actions are not the same as the disputes involved in the franchisees' state court actions." 944 F. Supp. at 1022. In view of the strong federal policy of enforcing agreements to resolve disputes through arbitration, we find that DAI did not litigate substantial issues going to the merits of the franchisees' current claims, and thus did not waive arbitration.

Finally, the franchisees argue strenuously that they suffered various types of prejudice from these evictions, including the legal expense of defending the actions, the risk of losing their entire investment in their franchises and, for some of the franchisees, the money judgments or actual loss of their stores. Strictly speaking, in view of our holding above, it is not necessary for us to decide whether the franchisees suffered prejudice from being subject to these eviction actions. It is nevertheless clear to us that they did not suffer the type of prejudice that supports a finding of waiver.

We do not overlook the fact that several franchisees lost their entire investments in their franchises as a result of the judgments of possession DAI obtained. However, prejudice as defined by our cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. Stated in these terms, the franchisees have not shown any prejudice warranting a finding of waiver. First, the franchisees admit that DAI did not delay in moving to compel arbitration of their present claims in state court. 944 F. Supp. at 1021. Moreover, legal expenses inherent to litigation, "without more," do not constitute prejudice requiring a finding of waiver. Leadertex, 67 F.3d at 26. Finally, the franchisees have not shown that they will suffer "substantive" prej-

udice to their state-court claims if they are forced to arbitrate. See Lawrence, 833 F.2d at 1165. DAI has neither conducted discovery with respect to these claims nor made any motions going to the merits of the claims. Significantly, DAI has assured us that, in arbitration, it will not oppose any of the franchisees' claims on res judicata or collateral estoppel grounds due to the franchisees' failure to raise them in the prior eviction actions.

On these facts, we hold that DAI did not waive its right to compel arbitration of the franchisees' claims.

IV. Fraudulent Inducement of the Arbitration Agreement

The franchisees argue that the district court erred in rejecting, as a matter of law, their defense that DAI fraudulently induced them to accept the arbitration clause. Specifically, they claim that DAI (1) falsely represented in its offering circulars and franchise agreements that arbitration is a "condition precedent" to litigation, and (2) concealed the material fact that DAI "controls" its franchisees by instructing its assetless leasing companies to threaten or institute eviction proceedings. The district court found—even after considering the franchisees' last-minute affidavits—that there were no material issues of fact in dispute, and held that the franchisees had not "offered evidence from which it could be found" that DAI had made any false representations that induced their agreement to arbitrate. 944 F. Supp. at 1017-18.

It is clear that a court, not an arbitrator, resolves a claim that an arbitration clause—as opposed to the contract as a whole—was fraudulently induced. *Distajo I*, 66

F.3d at 457 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)). We apply state law "concerning the validity, revocability, and enforceability of contracts generally" to the issue whether DAI fraudulently induced the arbitration agreement. See Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); Stuart, 85 F.3d at 979-80 (applying, without discussion, Connecticut law to franchisees' fraudulent inducement claim); Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45-46 (2d Cir. 1993) (state law applies to whether parties agreed to arbitrate).

The franchisees maintain that we should apply Illinois law on fraudulent inducement. The district court applied Connecticut law pursuant to the choice-of-law clause in most of the relevant franchise agreements. It noted with respect to certain franchisees, whose contracts designated Florida or Illinois law as controlling, that DAI claimed, "without contradiction, that Florida and Illinois law do[ ] not differ" from Connecticut law on fraudulent inducement. 944 F.Supp at 1017 n.2. Thus, the franchisees waived this issue, and, as in *Distajo I*, 66 F.3d at 451, and *Stuart*, 85 F.3d at 979-80, we apply Connecticut law to their fraud claims.

It is well-settled under Connecticut law that to prove fraudulent inducement, a party must show "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury." Stuart, 85 F.3d at 979 (citing Miller v. Appleby, 438 A.2d 811, 813 (Conn. 1981)). In *Stuart*, we held that Subway franchisees making similar allegations "utterly failed to allege, much less prove, sufficient facts indi-

cating that they were defrauded into agreeing to arbitrate." Stuart, 85 F.3d at 980. We explained that before purchasing their franchise, each franchisee received copies of DAI's standard franchise agreement and sublease, and that the relevant clauses pertaining to arbitration and eviction "were not camouflaged." Id. We thus found that DAI had not made any false representations to the franchisees regarding the possibility of eviction for violation of the franchise agreement.

The district court made identical factual findings in this case with respect to the franchisees' access to copies of the franchise agreement and sublease and the contents of those documents. It concluded that "[a]t most, [the franchisees] lacked understanding of the ramifications of two documents which they had ample opportunity to read and understand. . . . They cannot hold DAI as misrepresenting what is plainly stated in the documents nor the legal ramifications thereof." 944 F. Supp. at 1018; see Stuart, 85 F.3d at 980.

On this record, we too "find that the district court properly held, as a matter of law, that DAI did not fraudulently induce [the franchisees] into signing the agreement to arbitrate." Id.

V. Unconscionability and Failure of the Contract to Meet the Parties' Reasonable Expectations

The franchisees argue that issues of fact remain with respect to their defenses that the arbitration clause is void and unenforceable because it is (1) unconscionable, and (2) fails to meet their reasonable contractual expectations, see Restatement (Second) of Contracts § 211. In their answers in the district court, most of which were filed in October 1994, the franchisees alleged that the

franchise agreement was an adhesion contract that effectively forced them to arbitrate disputes under the agreement, yet allowed DAI to resolve such disputes through eviction proceedings. They also complained that the contract did not mention the alleged "excessive" costs of arbitration. Id.

The franchisees waived this argument by not raising it to the district court in their papers opposing DAI's motion, filed in February 1996, to forgo trial and receive judgment as a matter of law on all defenses to arbitration. In any event, the franchisees' claims are meritless. They urge us to "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). Yet the franchisees have not presented a "well-supported" claim in this regard. In Doctor's Associates, Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996), we rejected a claim by Subway franchisees, who had been sued by DAI in eviction proceedings, that the arbitration clause was unconscionable. Id. at 112-13. We explained that the franchisees were not unfairly surprised or oppressed by DAI's resort to eviction proceedings because the "plain terms" of the sublease authorized such action. Id. at 113 (citing David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 249 (2d Cir. 1991). In *Stuart*, we rejected the franchisees' argument that the costs of arbitration rendered the contract unconscionable, observing that the franchise agreement clearly stated that the franchisees would have to pay standard arbitration costs. Stuart, 85 F.3d at 980-81. Thus, even if the franchisees had properly raised

these arguments, they would fail under the reasoning of our prior cases.

VI. Imposing Preliminary Injunctions Without Requiring a Bond

The franchisees argue that the district court abused its discretion by issuing preliminary injunctions in January and March 1996, without requiring DAI to post bonds pursuant to Fed.R.Civ.P. 65(c). In January 1996, after our remand in *Distajo I*, the district court enjoined the franchisees from prosecuting their state cases, finding that this relief was "necessary in aid of" federal jurisdiction. 944 F. Supp. 1007, 1008-09 (citing 28 U.S.C. § 2283). In its March 14 order compelling arbitration, the district court continued the injunction to "effectuate" that order. 944 F. Supp. at 1023. The district court did not require DAI to post a bond for either injunction because it found that defendants would not suffer damage or loss from being forced to arbitrate in lieu of prosecuting their state-court cases.

Rule 65(c) states, in relevant part, that

> [n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Id. In *Stuart*, we flatly rejected an identical argument that the district court should have required such a bond. Rule 65(c) gives the district court wide discretion to set the amount of a bond, and even to dispense with the bond requirement "where there has been no proof of

likelihood of harm, or where the injunctive order was issued 'to aid and preserve the court's jurisdiction over the subject matter involved.' " Stuart, 85 F.3d at 985 (citations omitted). As in *Stuart*, both circumstances apply in this case. We therefore hold that the district court did not abuse its discretion by entering the injunctions without requiring DAI to post bonds.

VII. Personal Jurisdiction over the Kanchwala Franchisees

The Kanchwala franchisees argue that the district court did not have personal jurisdiction over them. They allege that DAI violated 9 U.S.C. § 4 and Fed.R.Civ.P. 4(c) and 4(e)(1) by serving the Kanchwalas by mailing a copy of the summons and complaint to Mr. Duree, their attorney, instead of personally serving them. The Kanchwala franchisees also claim that the district court did not have personal jurisdiction and venue "by contract" because the validity of the arbitration contract was in dispute. They base this argument on the fact that in October 1995 an Illinois court held that the arbitration clause in the Kanchwalas' franchise agreement was void and unenforceable. Finally, they argue that "at the very least" the district court should have held a hearing under Fed.R.Civ.P. 12(d) to determine personal jurisdiction.

By not raising these issues in their papers filed in opposition to DAI's motion for judgment as a matter of law and by failing to request in the district court a hearing under Rule 12(d), the Kanchwalas consented to personal jurisdiction. In any event, faced with identical arguments in *Stuart*, we applied the long-standing principle that a party who agrees to arbitrate in a state (such as Connecticut) in which the FAA makes arbitration

agreements enforceable also consents to jurisdiction in whatever court could compel arbitration in that state. Stuart, 85 F.3d at 979 (citing Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964)). Moreover, we held that the AAA Rules, incorporated into all Subway franchise agreements, governed service of process and specifically allowed service by mail on a party's representative. Id. at 982. Finally, we decided that the district court had handled the question of personal jurisdiction correctly from a procedural point of view by holding a hearing on whether the arbitration agreement was enforceable. Id.; cf. AAACon Auto Transp., Inc. v. Klee, 356 F. Supp. 319, 321 (S.D.N.Y. 1973) (district court may hold hearing to ascertain whether parties entered an agreement to arbitrate). We see no logical reason to reach a different result here, and thus hold that the district court did have personal jurisdiction over the Kanchwala franchisees.

VIII. Rooker-Feldman Doctrine

The franchisees argue, for the first time on appeal, that the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine to order them to arbitrate and to enjoin them from prosecuting their state suits. They contend that DAI's petitions to compel arbitration represent impermissible attempts to "avoid" judgments the franchisees obtained in Illinois state court.

After DAI filed petitions in the district court to compel arbitration, two Illinois courts issued orders granting summary judgment to certain franchisees. Shino v. Doctor's Associates, Inc., No. 93-L-1293 (Cir. Ct. Madison County, Oct. 24, 1994); Kanchwala v. Doctor's Associ-

ates, Inc., No. 95-L-1292 (Cir. Ct. Madison County, Oct. 13, 1995). The Illinois courts held that DAI waived its right to arbitrate claims by those franchisees against whom DAI had filed eviction actions. The courts also held that the arbitration clauses in the franchise agreements were void and unenforceable because they (1) were unconscionable, (2) failed to meet the parties' reasonable contractual expectations, and (3) lacked mutuality.

Some explanation of the tangled proceedings in the Bickel case is also necessary. In December 1994, the Bickels filed an action against DAI in the Circuit Court of Madison County, Illinois, alleging fraud, various breaches of the franchise agreement, and seeking a declaration that the arbitration clause was unenforceable. In mid-January 1995, DAI promptly filed both a demand with the AAA for arbitration of the Bickels' claims and its present petition to compel arbitration. Because DAI did not appear in the Illinois action, the Bickels moved for and obtained from the Illinois court on February 7, 1995, a default judgment against DAI. That court scheduled a damage hearing for April.

Only days later, on February 13, the district court granted DAI's petition to compel arbitration of the Bickels' claims, and entered a preliminary injunction by endorsement enjoining the Bickels from further prosecuting their Illinois suit. In September 1995, in *Distajo I*, we reversed the district court's order compelling arbitration and vacated the preliminary injunction. Distajo I, 66 F.3d at 458. The mandate issued on November 29, 1995.

Thereafter, on December 5, 1995, the district court entered a temporary restraining order (TRO), again

enjoining the Bickels from prosecuting their state suit. The Bickels admit that they did not advise the Illinois court of this TRO. Consequently, on December 6, 1995, stating that it had been "advised" that our decision in *Distajo I* lifted the injunction against the Bickels, the Illinois court awarded the Bickels $400,000 in damages. The Bickels now argue that this $400,000 state court judgment strips the district court of subject matter jurisdiction to entertain DAI's petition to compel arbitration.

A challenge to a federal court's subject matter jurisdiction under the *Rooker-Feldman* doctrine "may be raised at any time by either party or *sua sponte* by the court." Moccio v. New York State Office of Court Admin., 95 F.3d 195, 198 (2d Cir. 1996) (citing Ritter v. Ross, 992 F.2d 750, 752 (7th Cir. 1993)). The doctrine evolved from the Supreme Court's opinions in D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). It rests on the principle that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." Feldman, 460 U.S. at 482; Rooker, 273 U.S. at 416. The *Feldman* Court thus held that a district court lacked subject matter jurisdiction to entertain a federal suit attacking a state court judgment against a particular individual. Feldman, 460 U.S. at 483-86. However, the Court held that a plaintiff could still bring in federal district court a general challenge to a state rule, id., unless the issues raised were "inextricably intertwined" with those resolved in the state judgment against the individual, id. at 482 n.16.

DAI complains that the franchisees' *Rooker-Feldman* argument merely restates their argument on appeal in *Distajo I* that the district court should have given preclusive effect to state court judgments holding the franchise

agreements to be void and unenforceable. We rejected that argument because the Illinois judgments were not final under that state's rule until the time for appeal had expired, and therefore not entitled to preclusive effect. Distajo I, 66 F.3d at 449-51.

Nevertheless, we cannot dismiss the franchisees' *Rooker-Feldman* argument based on the preclusion analysis applied in *Distajo I*. We did recently hold that the *Rooker-Feldman* doctrine "at a minimum" is coextensive with preclusion principles. Moccio, 95 F.3d at 199-200. Thus, subsequent litigation in federal court "will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion." Id. at 200. However, a district court may lack subject matter jurisdiction under the *Rooker-Feldman* doctrine even when that court would not be precluded, under res judicata or collateral estoppel principles, by a prior state judgment. "It cannot be the meaning of *Rooker-Feldman* that, while the inferior federal courts are barred from reviewing *final* decisions of state courts, they are free to review interlocutory orders." Campbell v. Greisberger, 80 F.3d 703, 707 (2d Cir. 1996) (*Rooker-Feldman* challenge to interlocutory order); Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995) (*Rooker-Feldman* applies whether an order is "final or interlocutory in nature"). Thus, our holding in *Distajo I* that preclusion did not attach to Illinois judgments that were not final does not resolve the franchisees' *Rooker-Feldman* claim.

Nevertheless, we hold that the *Rooker-Feldman* rationale does not bar jurisdiction over DAI petitions to compel arbitration. We cannot say that DAI is attempting to appeal from any of the state court decisions. See Gash Assoc. v. Village of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993) (*Rooker-Feldman* prohibits a district court

from exercising an appellate function over a state court). Indeed, DAI filed its petitions to compel arbitration of the franchisees' state actions *before* the state courts had made any rulings on the merits in those actions. See Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1143 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987) (*Rooker-Feldman* applicable "[o]nce a litigant has received an adverse adjudication" on an issue); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Doe, 868 F. Supp. 532, 538 (S.D.N.Y. 1994) (plaintiff was not seeking review of state court TRO because it filed its federal action before the state court issued the TRO). Moreover, with respect to the Bickels' $400,000 default judgment, the Bickels admit that they did not tell the Illinois court of the TRO entered by the district court after the remand in *Distajo I*. Finally, the parties have not cited, nor have we found, any cases applying the *Rooker-Feldman* doctrine to deprive a district court of subject matter jurisdiction over a petition to compel arbitration under 9 U.S.C. § 4. On these facts, we cannot say that the district court lacked jurisdiction under *Rooker-Feldman* to adjudicate DAI's petitions to compel arbitration.

IX. Abstention

The Bickels argue that, in view of the $400,000 Illinois state court judgment described above, the district court abused its discretion by not abstaining from exercising jurisdiction over DAI's petition to compel arbitration. The district court observed that this argument was a "slightly modified version" of the Bickels' unsuccessful argument that the district court was precluded from exercising jurisdiction by reason of the Illinois court's judgment. 944 F. Supp. at 1022. In addition, the

district court held that abstention under *Moses Cone* was not warranted because the Illinois court had not engaged in "substantial proceedings" in entering the default judgment against DAI, compared to the two years of proceedings already completed in the district court in these consolidated cases. Id. at 1022-23.

We review a district court's decision *not* to abstain for abuse of discretion. Tribune Co. v. Abiola, 66 F.3d 12, 15 (2d Cir. 1995); see Sheerbonnet, Ltd. v. American Exp. Bank Ltd., 17 F.3d 46, 48 (2d Cir.), cert. denied, 115 S.Ct. 67 (1994). This review is less "rigorous" than that required when a district court *does* abstain, because the district court has "considerably broader discretion" when denying a party's motion to abstain. Tribune, 66 F.3d at 15.

The franchisees have failed to articulate any persuasive reason why abstention would be proper in this case. Certainly, as the district court found, the Illinois default judgment, entered without an evidentiary hearing, does not constitute a "substantial" state proceeding warranting abstention under *Moses Cone*. See 460 U.S. at 21-22. We hold that the district court did not abuse its discretion by exercising jurisdiction over DAI's petition to compel arbitration of the Bickels' state-court claims.

X. Conclusion

We have considered all of the franchisees' arguments, and they are without merit. We affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OS COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of June, one thousand nine hundred and ninety-seven.

PRESENT:

ELLSWORTH A. VAN GRAAFEILAND,
ROGER J. MINER,
JOSE A. CABRANES,
Circuit Judges.

DOCTOR'S ASSOCIATES, INC.,

Plaintiff-Appellee,

v.

No. 96-9141

DENNIS W. RIGGS,

Defendant-Appellant,

APPEARING FOR APPELLANT:

David M. Duree (Reinert & Duree,
St. Louis, MO, Nicholas Wocl,Tooher,
Puzzouli & Wocl,
Stamford, CT)

APPEARING FOR APPELLEE:

Edward Wood Dunham (Wiggin & Dana,
New Haven, CT)

Appeal from the United States District Court for the District of Connecticut (Peter C. Dorsey, *Chief Judge*).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

The defendant appeals from a Ruling on Pending Motions filed on August 22, 1996 ("Ruling"), and a judgment entered pursuant thereto, by the United States District Court for the District of Connecticut (Peter C. Dorsey, *Chief Judge*), granting the plaintiff's motion to compel arbitration, denying the defendant's motion for summary judgment, and enjoining the defendant from commencing or otherwise pursuing any legal action on a matter subject to arbitration under any franchise agreement between the parties.

We affirm the judgment of the district court substantially for the reasons set forth in the Ruling. We note, too, that, since the district court filed its judgment, we decided *Doctor's Assocs., Inc. v. Distajo,*

107 F. 3d. 126 (2d. Cir. 1997), which resolves many of the same issues raised here in favor of the plaintiff and, accordingly, provides additional authority to support the district court's decision.

We have reviewed all of the defendant's claims and find them to be without merit.

Accordingly, the judgment of the district court is AFFIRMED.

Ellsworth A.
Van Graafeiland, U.S.C.J.

Roger J. Miner, U.S.C.J.

Jose A. Cabranes, U.S.C.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.

Filed 8-22-96

v.

CIVIL NO. 3:96

DENNIS W. RIGGS

CV 1334 PCD

JUDGMENT

This cause came on for consideration on the plaintiff's motion for preliminary injunction and the defendant's cross-motion for summary judgment, before the Honorable Peter C. Dorsey, Chief United States District Judge.

On August 1, 1996, a hearing was held on the motion for preliminary injunction, which was taken under advisement. The Court has considered all of the papers filed in this action and has considered all of the arguments made at the hearing. On August 22, 1996, the Court filed its "Ruling on Pending Motions," granting the plaintiff's motion to compel arbitration, denying as moot the plaintiff's motion for preliminary injunction and denying the defendant's motion for summary judgment. It was further ordered that the defendant, his agents, representatives, attorneys and anyone acting on his behalf are enjoined, until further order of the court, from commencing, prosecuting, or in

any way action in any action related to or arising under any franchise agreement with the plaintiff and/or acting in an matter or dispute which is or may be subject to an arbitration clause in any such agreement.,

Therefore, pursuant to the Court's ruling, the motion to compel arbitration is granted, the motion for preliminary injunction is denied as moot, the motion for summary judgment is denied and the case is closed.

Dated at New Haven, Connecticut, this 22nd day of August, 1996.

KEVIN F. ROWE, CLERK

By

_____

Victoria C. Minor

Chief Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC.,	:	
Plaintiff,	:	Filed
	:	8-22-96
v.	:	
	:	Civil No.
DENNIS W. RIGGS,	:	3:96CV01334
Defendant.	:	(PCD)

RULING ON PENDING MOTIONS

Plaintiff Doctor's Associate's, Inc. ("DAI") is the franchisor of Subway sandwich shops. Defendant Dennis W. Riggs is a Subway franchisee who has operated a shop in Niles, Illinois.

On March 9, 1994, Riggs assumed all obligations of two Subway franchisees under a pre-existing franchise agreement. The agreement contains a clause requiring arbitration of all contractual disputes in Connecticut.

On June 17, 1996, an action to evict Riggs from is Subway shop was filed in Illinois State court by a lessor that, for purposes of this litigation, DAI concedes controlling. *See Subway Central, Inc. v. Riggs,* No. 96M1716579 1402 (Cir. Ct. of Cook County, Ill. filed June 17, 1996). On June 18, 1996, Riggs filed suit against DAI in federal court in Illinois, alleging that DAI fraudulently induced the franchise relationship and waived its right to arbitrate by pursuing the eviction action. *See Riggs v. Subway Restaurants, Inc.,* No. 96 C 3690 (N.D. Ill. filed June 18, 1996).

In this action, DAI petitions to compel arbitration of the parties' disputes, pursuant to Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4. DAI also moves for a preliminary injunction barring the Illinois federal action until this court rules on the petition to compel arbitration. Riggs moves for summary judgment, arguing, as in the Illinois federal suit, that DAI waived its right to arbitrate by pursuing the eviction action.

I. DISCUSSION

This action is largely indistinguishable from twenty-eight prior actions that have come before this court. *See Doctor's Assocs., Inc. v. White,* 3:96CV01313 (D. Conn. filed July 10, 1996); *Doctor's Assocs., Inc. v. Neal,* 3:96CV00703 (D. Conn. filed Apr. 19, 1996); *Doctor's Assocs., Inc. v. Jabush,* 3:95CV00695 (D. Conn. filed Apr. 19, 1995) (6 consolidated cases); *Doctor's Assocs., Inc. v. Knoll,* 3:94CV01738 (D. Conn. filed Oct. 13, 1994); *Doctor's Assocs., Inc. v. Distajo,* 3:94CV00349 (D. Conn. filed Mar. 8, 1994) (19 consolidated cases). In all but one of those actions, the court granted DAI's motions for preliminary injunction and petitions to compel arbitration.* *See, e.g., Doctor's Assocs., Inc. v. Distajo,* 3:94CV0349 (D. Conn. Jan. 2, 1996 (rl'g on mot. for prelim. inj.) and Mar. 12, 1996 (rl'g granting pet. to compel arb.)).

In this action, the court declines to decide DAI's motion for preliminary injunction as there is no need to delay decision on the petition to compel arbitration. Such a petition is ripe for decision five days after it is filed and served. *Unionmutual Stock Life Ins. Co. of*

---

* In *Doctor's Assocs., Inc. v. White,* 3:96CV01313 (D. Conn. July 31, 1996), DAI's motion for preliminary injunction was denied, without prejudice to renew, based on a reported settlement. DAI's petition to compel arbitration remains pending.

Am. V. Beneficial Life Ins. Co., 774 F. 2d 524, 526 (1st Cir. 1985). Forty-six days have now passed since DAI's petition was filed and served.

The petition is granted for the reasons stated below. Riggs' summary judgment motion asserts the same waiver defense that is raised in his answer to DAI's petition; the motion is denied for the reasons stated below in connection with waiver.

A. Jury Demand

Riggs demands a jury trial on all issues. A party resisting arbitration "cannot obtain a jury trial merely by demanding one." *Doctor's Assocs., Inc. v. Stuart*, 85 F. 3d 975, 983 (2d Cir. 1996) (citation omitted). Rather, he must produce evidence to substantiate factual allegations that, if proven, would relieve him of the obligation to arbitrate. *Dillard v. Merril Lynch, Pierce, Fenner & Smith, Inc.*, 961 F. 2d 1148, 1154 (5th Cir. 1992), *cert. denied sub nom. Dillard v. Security Pac. Corp.*, 506 U.S. 1079 (1993). The evidence submitted is insufficient for the reasons stated below and, therefore, fails to force a jury trial.

B. Choice of Law Provision

Riggs initially argued that the franchise agreement's choice of law clause violates the Illinois Franchise Disclosure Act, 815 ILCS § 705/1 *et seq.*, because it applies Connecticut, not Illinois, law. In fact, the clause does apply Illinois law, and Riggs concedes as much in an August 9, 1996 brief.

C. Fraud

As in the Illinois federal suit, Riggs contends that DAI fraudulently induced the franchise relationship. This defense was previously rejected with respect to other franchisees, in a discussion that is applicable

here. *See Doctor's Assocs., Inc. v. Distajo*, No. 3:94CV00349 (PCD), slip op. at 5-8 (D. Conn. Mar. 12, 1996)

D. Waiver

1. Deferring to Federal Court in Illinois

Riggs argues that this court should defer to the Illinois federal court on whether DAI's pursuit of the eviction action waived its right to arbitrate. Deferral, however, would leave the waiver issue unresolved, as the Illinois court has itself deferred and left the waiver issue for this court to decide. In the Illinois suit, the judge stated: "the question whether one is to be compelled to arbitrate or be excused from arbitration belongs in the court where the arbitration is supposed to take place." *Riggs v. Subway Restaurants, Inc.*, No. 96 C 3690, slip op. at 1 (N.D. Ill. July 31, 1996) (citing *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F. 3d 323 (7th Cir. 1995)). The judge further stated: "this matter ought to be handled in the Connecticut courts where arbitration must take place." *Id.* This court will not drop the ball that the Illinois court has handed it.

2. Applicable Law

a. Illinois v. Federal Law

Riggs asserts that Illinois, not federal, law governs his waiver defense and that, therefore, he need not show that he was prejudiced by the eviction suit. *Compare Kennedy v. Commercial Carriers, Inc.*, 630 N.E. 2d 1059, 1062 (Ill. App. 1994) (waiver occurs when a party merely submits an arbitrable issue to litigation), *appeal denied*, 642 N.E. 2d 1282 (Ill. 1994), *with Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos*, 553 F. 2d 842, 845 (2d Cir. 1977) ("[T]he filing of an action [] is not a waiver of the right to arbitrate....") *and Miller*

Brewing Co. v. Fort Worth Distrib. Co., 781 F. 2d 494, 497 (5th Cir. 1986) ("Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment of prejudice of the other party.").

Riggs' claim is without merit. Under the FAA, federal, not state, law determines whether the right to arbitrate has been waived. *See, e.g., Lecopulos*, 553 F. 2d at 845 (applying federal law to waiver issue). This is true, in this case, despite the Illinois choice of law clause in the franchise agreement. *See, e.g., Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F. 2d 1056, 1062 (9th Cir. 1991) (federal rather than state arbitration rules applied, even though underlying contract contained New York choice of law provision.)

b. Seventh v. Second Circuit Law

Riggs also asserts that the law of the Seventh, not the Second, Circuit governs his waiver defense and that, therefore, he need not show prejudice. *Compare Cabinetree of Wis., Inc. v. Kraftmade Cabinetry, Inc.*, 50 F. 3d 388, 390 (7th Cir. 1995) (merely the "election to proceed before a nonarbitral tribunal...is a presumptive waiver of the right to waiver") *with Doctor's Assocs., Inc. v. Distajo*, 66 F. 3d 438, 457 (2d Cir. 1995) (identifying prejudice as an element of waiver), *cert. denied*, ___U.S.___, 116 S. Ct. 1352 (1996).

Riggs offers no authority for applying the law of another circuit. Nor is this court aware of any such authority.

3. Merits

DAI did not waive its right to arbitrate because Riggs was not prejudiced by the eviction lawsuit. This court's rejection of the waiver defense with respect to similarly situated franchisees, *see Doctor's Assocs., Inc.*

v. Distajo, No. 3:94CV00349 (PCD), slip op. at 9-16 (D. Conn. Mar. 12, 1996), is applicable here.

E. Forum Selection Clause

Riggs argues that the franchise agreement's forum selection clause, providing for arbitration in Connecticut, is an unconscionable contract of adhesion forced upon him by DAI's superior bargaining power. Similar arguments by other Subway franchisees have been rejected by the Second Circuit. *See Doctor's Assocs., Inc. v. Jabush,* Nos. 95-7694(L), 95-7764(CON), 1996 WL 393137, at *4-5 (2d Cir. July 16, 1996); *Doctor's Assocs., Inc. v. Stuart,* 85 F. 3d 975, 980-81 (2d Cir. 1996).

"The use of a standard form contract between...parties of...unequal bargaining power does not" automatically render their agreement unconscionable. *Webb v. R. Rowland & Co.,* 800 F. 2d 803, 807 (8th Cir. 1986). The unconscionability doctrine is designed '"to prevent unfair surprise and oppression.'" *Stuart,* 85 F. 3d at 980 (citations omitted). Riggs was not unfairly surprised or oppressed. Before assuming his Subway franchise, Riggs received from DAI a Uniform Franchise Offering Circular which contained a standard franchise agreement with the forum selection clause at issue here. "As [a] purchaser[] of a Subway sandwich franchise, [Riggs was] '...not [a] vulnerable consumer[] or helpless worker[]. [He was a] business [person] who bought a franchise.'" *Jabush,* 1996 WL 393137, at *5 (citation omitted). Therefore, it cannot be said that he was '"forced to swallow unpalatable terms.'" *Id.* (citation omitted).

II. CONCLUSION

DAI's petition to compel arbitration (doc. 1-1) is granted. Riggs' motion for summary judgment (doc. 14-1) is denied. DAI's motion for preliminary injunction (doc.3-1) is denied as moot in light of the foregoing.

To effectuate the decisions reached herein, the following order is entered: Riggs, his agents, representatives, attorneys, and anyone acting on his behalf are enjoined, until further order of this court, from commencing, prosecuting, or in any way acting in (1) any action related to or arising under any franchise agreement with DAI, and/or (2) any matter or dispute which is or may be subject to an arbitration clause in any such agreement.

The clerk shall enter judgment and close the file.

SO ORDERED.

Dated at New Haven, Connecticut, August 21, 1996.

Peter C. Dorsey
Chief United State District Judge

QUESTIONS PRESENTED IN THIS AND TWO OTHER PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE FEBRUARY 24, 1997 JUDGMENT IN SECOND CIRCUIT

DOCKET NO. 96-7321

I. Whether the abstention doctrine bars a federal court from enjoining further prosecution of a state case in which a judgment for $400,000.00 has been entered, an appeal bond posted and appeal filed, while ordering arbitration of the same claim previously determined by the state judgment?

II. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate state judgments holding the arbitration clauses void and unenforceable and awarding $400,000.00 in damages if the federal actions were filed before the state judgments were entered?

III. Whether the Rooker-Feldman Doctrine denies subject matter jurisdiction to the lower federal courts to relitigate the issues and claims previously determined by the North Carolina state court which refused to enforce the arbitration clause, if the Connecticut federal action was filed after the state rulings and raised issues inextricably intertwined with the state rulings: the validity and enforceability of the arbitration clause?

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE FEBRUARY 24, 1997 JUDGMENT IN SECOND CIRCUIT

DOCKET NO. 96-7011

I. Whether a federal court may enjoin in personam proceedings in a state court which has concurrent jurisdiction over the same claim, to insure federal determination of that claim?

II. Whether the federal courts may avoid appellate scrutiny of a federal injunction of state proceedings, issued in violation of 28 U.S.C. §2283 to preserve the case for federal determination, by entering a subsequent judgment and another injunction to effectuate it, made possible by the earlier, offending injunction?

QUESTIONS PRESENTED IN THE PETITION ARISING FROM THE JUNE 10, 1997 JUDGMENT IN SECOND CIRCUIT

DOCKET NO. 96-9141

I. Whether state law or federal common law determines the waiver defense to enforceability of a contract to arbitrate?

II. If federal common law determines the waiver defense, whether prejudice to the non-waiving party is an element of the defense?

Supreme Court, U. S.
FILED
SEP 23 1997
CLERK

(2)

No. 97-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DENNIS W. RIGGS,

Petitioner,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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31pp

QUESTION PRESENTED

Did the Court of Appeals correctly determine under the particular facts of this case that respondent had not waived its right under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* to compel petitioner to arbitrate his claims against respondent in accordance with the terms of a valid arbitration agreement?

STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. has no parent company and no subsidiaries (other than wholly-owned subsidiaries).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
I. THE SECOND CIRCUIT'S FACT-BOUND NON-PRECEDENTIAL DECISION DOES NOT WARRANT REVIEW	7
II. THIS CASE DOES NOT PROVIDE AN OPPORTUNITY TO ADDRESS THE PREJUDICE ISSUE PRESENTED BY THE PETITION	8
III. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Allied Bruce Terminix Co., Inc. v. Dobson, 115 S. Ct. 834 (1995)	12, 13
Brown v. E.F. Hutton & Co., Inc., 610 F. Supp. 76 (S.D. Fla. 1985)	13
Cabinetree v. Kraftmaid Cabinetry, 50 F.3d 388 (7th Cir. 1995)	13, 14
Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1652 (1996)	2, 12
Doctor's Associates, Inc. v. Distajo, et al., 107 F.3d 126 (2d Cir. 1997), *cert. pending*	passim
Doctor's Associates, Inc. v. Distajo, et al., 66 F.3d 438 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1352 (1996)	1
Doctor's Associates, Inc. v. Distajo, et al., 944 F. Supp. 1010 (D. Conn. 1996)	10
Doctor's Associates, Inc. v. Jabush, et al., 89 F.3d 109 (2d Cir. 1996)	1
Doctor's Associates, Inc. v. Riggs, Civ. No. 3:96CV01334 (PCD) (D. Conn. filed July 11, 1996)	4
Doctor's Associates, Inc. v. Stuart, et al., 85 F.3d 975 (2d Cir. 1996)	1
Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328 (7th Cir. 1995)	9, 11
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	8
Lawn v. Franklin, 328 F. Supp. 791 (S.D.N.Y. 1971)	4

Cases: **Page**

Lawrence v. Comprehensive Business Services Co., 833 F.2d 1159 (5th Cir. 1987) 9, 11, 13

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)..... 7

Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20 (2d Cir. 1995) 9, 11

Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A., 759 F.2d 1027 (2d Cir. 1985) 4

Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995)..... 12

Merrill Lynch, Pierce, Fenner & Smith v. Lauer, 49 F.3d 323 (7th Cir. 1995) 4

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 12

Perry v. Thomas, 42 U.S. 483, 107 S. Ct. 2520 (1987)..... 12

Realco Enterprises, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, 738 F. Supp. 515 (S.D. Ga. 1990)..... 13

Redshaw Credit Corp. v. Insurance Professionals, Inc., 709 F. Supp. 1032 (D. Kan. 1989)..... 13

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)..... 7

Riggs v. Subway Restaurants, Inc., No. 96 C 3690 (N.D. Ill. filed June 18, 1996)..... 3

Riggs v. Subway Restaurants, Inc., No. 96 C 3690 (N.D. Ill. filed June 18, 1996) Slip Op. at 1 (N.D. Ill. July 31, 1996)..... 4, 5

Snyder v. Smith, 736 F.2d 409 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984)..... 4

Cases:	**Page**
Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 862 (1984)	12
Subway Central, Inc. v. Riggs, No. 96M1716579 1402 (Cir. Ct. of Cook County, Ill. filed June 17, 1996)	3
United States v. Johnston, 268 U.S. 220 (1925)	8
Statutes:	
Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*	i, 4
Miscellaneous:	
Ian R. MacNeil, *et al.*, *Federal Arbitration Law* at 10:65 (1995)	13

No. 97-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DENNIS W. RIGGS,

Petitioner,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is one in a series of appeals to the United States Court of Appeals for the Second Circuit and this Court by certain Subway sandwich shop franchisees seeking to avoid their contractual obligation to arbitrate their claims against Doctor's Associates, Inc. ("DAI"), the Subway franchisor. *See, e.g., Doctor's Associates, Inc. v. Distajo, et al.*, 107 F.3d 126 (2d Cir. 1997), *cert. pending* ("*Distajo II*"); *Doctor's Associates, Inc. v. Jabush, et al.*, 89 F.3d 109 (2d Cir. 1996) ("*Jabush*"); *Doctor's Associates, Inc. v. Stuart, et al.*, 85 F.3d 975 (2d Cir. 1996) ("*Stuart*"); *Doctor's Associates, Inc. v. Distajo, et al.*, 66 F.3d 438 (2d Cir. 1995), *cert. denied*, 116

S. Ct. 1352 (1996) ("*Distajo I*"). *See also Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996). As the District Court noted below, "[t]his action is legally indistinguishable from twenty-eight prior actions that have come before this court." *See* Petitioner's Appendix ("Pet. App.") 37a.

The franchisee in this particular case is Dennis W. Riggs. Mr. Riggs operated a Subway store in Niles, Illinois, pursuant to a standard form franchise agreement with DAI. The store is located in a building that Mr. Riggs subleased from one of DAI's affiliated companies, Subway Central, Inc. ("Subway Central"). Both the franchise agreement and sublease are, in all material respects, identical to those at issue in *Distajo I* and *II*, *Stuart* and *Jabush*. The franchise agreement contains a standard American Arbitration Association ("AAA") arbitration clause, requiring arbitration, in Bridgeport, Connecticut, on demand of either party, of all "disputes arising out of or relating to the" franchise agreement.[1]

This dispute arose when Mr. Riggs stopped paying the rent required by his sublease. On May 31, 1996, Subway Central filed suit against Mr. Riggs in the Circuit Court of Cook County, Illinois, seeking to regain possession of the premises

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[1] The arbitration clause provides as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgement upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. Each party will be responsible for their own costs in conjunction with the arbitration proceeding. If Franchisee commences action in any court prior to an arbitrator's final decision on the controversy or claim, then the Franchisee will be responsible for all expenses incurred by the Company and Franchisee in the arbitration and the court proceedings.

and to recover back rent and related charges totalling $10,313.79. *See Subway Central, Inc. v. Riggs*, No. 96M1716579 1402 (Cir. Ct. of Cook County, Ill. filed June 17, 1996). The sole basis for eviction alleged by Subway Central was Mr. Riggs's failure to pay the rent required by the sublease; Subway Central never asserted a breach of the franchise agreement as a ground for the eviction. In the eviction action, Mr. Riggs never disputed that he was behind on the rent, and he never challenged the amount that Subway Central sought to recover or denied that his rent default was a material breach of the sublease, entitling Subway Central to possession of the premises.

On June 18, 1996, approximately two weeks after the eviction action was filed, and before any activity of substance had occurred in that action,[2] Mr. Riggs and his corporation filed a lawsuit in the United States District Court for the Northern District of Illinois against DAI, Subway Restaurants, Inc., Subway Central, and DAI's owners, Frederick A. DeLuca and Peter H. Buck. *See Riggs v. Subway Restaurants, Inc.*, No. 96 C 3690 (N.D. Ill. filed June 18, 1996). The complaint alleged, among other things, that DAI had waived its right to arbitrate by causing Subway Central to file the eviction action, that defendants had defrauded Mr. Riggs into entering into the franchise agreement, and that the defendants had violated the Illinois Franchise Disclosure Act and the Illinois Consumer Fraud and Deceptive Business Practices Act. *Id.*; *see* Pet. App. 36a. Mr. Riggs sought rescission of the franchise agreement, over $150,000.00 in actual damages, and an unspecified amount of punitive damages. Mr. Riggs never asserted in the eviction action any of his claims in the federal lawsuit.

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[2] Mr. Riggs responded to the eviction action by claiming in his Answer that neither Subway Central nor Subway Restaurants, Inc. (which had assigned the sublease to Subway Central) was registered to do business in Illinois. He never asserted any substantive defenses. Later, Mr. Riggs voluntarily abandoned the premises and judgment entered against him on April 14, 1997, approximately nine months after DAI filed its petition to compel arbitration and seven months after the Connecticut District Court issued its judgment compelling arbitration of Mr. Riggs's claims.

Promptly after Mr. Riggs filed his lawsuit, DAI filed in the United States District Court for the District of Connecticut a petition, under section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, to compel arbitration of his claims and a motion to enjoin prosecution of the lawsuit pending the arbitration. *See Doctor's Associates, Inc. v. Riggs*, Civ. No. 3:96CV01334 (PCD) (D.Conn. filed July 11, 1996). Because a petition to compel under section 4 may be brought only in the federal district with jurisdiction over the contractually designated site of arbitration and because Mr. Riggs's franchise agreement with DAI calls for arbitration in Bridgeport, the District of Connecticut was the only forum where DAI could properly file its petition. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995); *Snyder v. Smith*, 736 F.2d 409, 420 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A.*, 759 F.2d 1027, 1031 (2d Cir. 1985); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (S.D.N.Y. 1971).

Mr. Riggs opposed DAI's petition and alleged, among other claims, that DAI had waived its right to compel arbitration by causing Subway Central to file the eviction action. Pet. App. 40a. On July 12, 1996, the Connecticut District Court issued an order scheduling a hearing for August 1, 1996 on DAI's petition and motion for injunction. This order prompted Mr. Riggs's lawyers to file what they styled as an "emergency" motion in the Northern District of Illinois, seeking a temporary restraining order to prevent the Connecticut District Court from proceeding on DAI's petition to compel.

On July 31, 1996, the Northern District of Illinois denied Mr. Riggs's motion. *Riggs v. Subway Restaurants, Inc.*, No. 96 C 3690, Slip. Op. at 1 (N.D. Ill. July 31, 1996). The court held that the Seventh Circuit's recent decision in *Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 330 (7th Cir. 1995) required the court to give priority to DAI's petition to compel arbitration, because absent a facially unenforceable forum selection clause, "the question of whether one

is to be compelled to arbitrate or ... excused from arbitration belongs in the court where the arbitration is supposed to take place." *Id.* Because Mr. Riggs failed to introduce any evidence to support a claim that the arbitration agreement's selection of forum was unenforceable, the District Court Judge concluded that all issues of arbitrability "ought to be handled in Connecticut courts where arbitration must take place." *Id.*; *see* Pet. App. 39a.

After argument and briefing in the Connecticut District Court, that court compelled Mr. Riggs to arbitrate his dispute in accordance with his franchise agreement and enjoined him "until further order of this court, from commencing, prosecuting, or in any way acting in (1) any action related to or arising under any franchise agreement with DAI, and/or (2) any matter or dispute which is or may be subject to an arbitration clause in any such agreement." Pet. App. 42a. The District Court first rejected Mr. Riggs's argument that it should defer to the Illinois federal court to decide the waiver issue; since the Illinois court had **already** deferred, the court declined to "drop the ball that the Illinois court has handed it." Pet. App. 39a. The court next dismissed as "without merit" Mr. Riggs's claim that state law governs waiver of the right to arbitrate under the FAA. Pet. App. 39a-40a. Finally, noting that "[t]his action is largely indistinguishable from twenty-eight prior actions that have come before this court," including *Distajo I* and *II*, *Stuart* and *Jabush*, the District Court rejected petitioner's waiver arguments. According to the court, its rejection of the waiver defense in *Distajo II* "is applicable here." Pet. App. 40a-41a.

In an unpublished summary order, the Second Circuit affirmed the District Court. Pet. App. 31a-33a. Noting that the Second Circuit's own opinion in *Distajo II*, which was decided after the District Court's decision, resolved many of the same issues raised by Mr. Riggs, the court concluded that "we have reviewed all of the defendant's claims and find them to be without merit." Pet. App. 33a.

As both the Second Circuit and the District Court noted, the franchisees in *Distajo II* had raised waiver claims and presented factual circumstances that were virtually identical to those asserted by Mr. Riggs. After carefully reviewing the pleadings in the eviction actions and the franchisee lawsuits, the Second Circuit in *Distajo II* concluded that in the eviction actions that, like *Riggs*, were based solely upon a breach of the sublease, DAI had not litigated any arbitrable claims and, therefore, had not waived its right to demand arbitration.[3] *Distajo*, 107 F.3d at 132 n.11. Thus, the court expressly rejected the franchisees' claim that these eviction actions arose from the "same core facts" as the franchisees' claims for breach of the franchise agreement. *Id.* at 133. When its affiliates filed the eviction actions, therefore, DAI did not waive its right to arbitrate the entirely separate claims that the franchisees later raised in their lawsuits. *Id.* Finally, even though the Second Circuit noted that "[s]trictly speaking, in view of our holding above, it is not necessary for us to decide whether the franchisees suffered prejudice from being subject to these eviction actions," the court stated that the franchisees "did not suffer the type of prejudice that supports a finding of waiver." *Id.* at 133-34.

Both Mr. Riggs and the franchisees in the *Distajo II* case have now filed petitions for certiorari. Petition ("Pet.") 8. Significantly, however, the franchisees in *Distajo II* have **not** challenged the Second Circuit's holdings on waiver.

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[3] The eviction actions against certain *Distajo II* franchisees included allegations that the franchisees had breached the franchise agreement as well as the sublease. Nevertheless, the Second Circuit concluded that even in those eviction actions DAI had not litigated **any** of the legal or factual issues that were presented in the franchisees' lawsuits against DAI. *Id.* at 132-33. The eviction action against Mr. Riggs was based solely on an alleged breach of the sublease and did not involve the franchise agreement at all.

REASONS FOR DENYING THE PETITION

Petitioner's arguments for certiorari depend on his claim that the Second Circuit held that petitioner was required to make a showing of prejudice in order to warrant a finding that DAI had waived its right to arbitrate its disputes with petitioner. From that essential premise, petitioner asserts that the Second Circuit's decision conflicts with decisions of this Court, the Seventh Circuit and other federal courts. For several reasons, the Petition should be denied.

First, the opinion below is an unpublished, fact-specific decision that expressly states that it has no precedential value; it, therefore, does not warrant review by this Court.

Second, the premise of petitioner's arguments is false. Neither the Second Circuit's decision in *Riggs*, nor even its decision in *Distajo II*, holds that DAI did not waive its right to arbitrate because Mr. Riggs failed to demonstrate that he was prejudiced by the eviction action. As a result, this case does not provide the Court an opportunity to address the issue of prejudice that the Petition presents.

Third, the supposed conflict with decisions of this Court or the Seventh Circuit is also illusory. None of the decisions of this Court cited by petitioner held that the issue of waiver of rights to arbitrate under the FAA should be determined by state law. To the contrary, those decisions confirm what numerous lower courts, including the Seventh Circuit, have expressly held: whether a party has waived its federal right to compel arbitration under the FAA is a matter of federal, not state, law.

I. THE SECOND CIRCUIT'S FACT-BOUND NON-PRECEDENTIAL DECISION DOES NOT WARRANT REVIEW.

The Court has consistently stated that writs of certiorari will not issue "except in cases involving principles the settlement of which is of importance to the public, as distinguished from [ ] the parties..." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *see Rice v. Sioux City*

Cemetery, 349 U.S. 70, 79 (1955). The Court has also repeatedly stated that other than in exceptional circumstances not presented here, it will not review fact-specific determinations by the lower courts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (court will not review evidence or factual findings); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (court will not review findings of fact without exceptional show of error). Here, the Second Circuit's summary order provides no legal analysis or conclusions for review. By its terms, the summary order has no precedential value and is limited to its facts. The Second Circuit's fact-specific decision thus has importance only to the parties and does not present any issue of public importance. It does not warrant this Court's review.

II. THIS CASE DOES NOT PROVIDE AN OPPORTUNITY TO ADDRESS THE PREJUDICE ISSUE PRESENTED BY THE PETITION.

Each of the arguments for certiorari advanced by petitioner turns on his claim that the Second Circuit required as a condition to a waiver finding a showing that the eviction action prejudiced Mr. Riggs. Pet. 6. Thus, the contention that Illinois law should determine whether a party to an arbitration agreement has waived its right to compel arbitration under the FAA, as well as the assertion that the Seventh and Second Circuits have issued conflicting decisions on the standard for determining waiver, are entirely dependent upon petitioner's claim that the Second Circuit in this case erroneously rejected his waiver claim because he failed to show prejudice. Pet. 12-13.

The Second Circuit did no such thing. Nowhere in its summary order in *Riggs* did the Second Circuit state or hold that petitioner's waiver defense failed because he could not show that he was prejudiced by Subway Central's filing of the eviction action. Pet. App. 32a-33a. While the court did cite to and rely upon its decision in *Distajo II*, the decision that is the real focus of the Petition, that decision also was not founded upon the franchisees' failure to show prejudice. Instead,

Distajo II is explicitly based on the Second Circuit's determination that DAI had not litigated in any of the eviction actions the factual or legal issues raised in the franchisees' lawsuits, a fact-specific determination that neither Mr. Riggs nor any of the *Distajo II* franchisees even challenge in their petitions.

1. The Second Circuit began its analysis of the waiver issue in *Distajo II* by citing the well-established general rule that "waiver of the right to arbitrate occurs when a party 'engages in protracted litigation that results in prejudice to the opposing party.'" 107 F.3d at 131 (*citing Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993); *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)). *See also Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995). The court noted that the District Court in *Distajo II*, as in *Riggs*, had rejected the franchisees' waiver claim solely on the basis that the franchisees had not shown prejudice. Significantly, however, the Second Circuit stated, "[w]e do not believe we are so constrained." 107 F.3d at 131. As a result, even before turning to the issue of prejudice, the court as a threshold matter first looked at the pleadings in the eviction actions and the franchisees' lawsuits to determine whether in the eviction actions DAI's affiliates had engaged in **any** litigation, let alone "protracted litigation," of the same issues that the franchisees' lawsuits presented. As the Second Circuit noted, courts of appeals agree that waiver of the right to arbitrate can be found only when a party has previously litigated the same claims it now seeks to arbitrate. *Id.* at 133. *See also Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 330-32 (7th Cir. 1995); *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1164-65 (5th Cir. 1987).

After a careful review of the facts of each case, the *Distajo II* court determined that none of the prior eviction actions involved the same legal and factual issues raised by the franchisees in their state suits: "The eviction actions were simple collection proceedings to recover relatively small amounts of unpaid fees and rents . . . In contrast, the franchisees' state suits, filed several months to one year after the evictions, allege various violations by DAI of the franchise agreement and

attack the validity of the franchise agreement and arbitration clause on a host of different federal and state law grounds." *Id.* As the court cogently observed, "'[t]here is no conceivable policy justification for a rule that, by exercising the reasonable business judgment to sue to evict someone from leased premises or to collect a debt of less than $10,000, a party waives for all time its right to arbitrate every other dispute imaginable, including multimillion dollar punitive damage claims of which the party has no knowledge when it files the eviction action.'" *Id.* at 132-133.

Because of this factual determination by the Second Circuit in *Distajo II*, the court explicitly stated that it was "not necessary for [the court] to decide whether the franchisees suffered prejudice from being subjected to eviction actions." *Id.* at 133-34. Though the court commented in a single sentence in its opinion that the franchisees had also not suffered prejudice from the filing of the eviction actions, this statement is clearly *dicta*. Thus, at best the Petition improperly asks this Court to review *dicta* in the Second Circuit's decision in *Distajo II*, where it is not even apparent that the Second Circuit relied upon that *dicta* in rejecting Mr. Riggs's claim of waiver. [4]

2. The eviction action against Mr. Riggs was based solely on his failure to pay rent under the sublease. Mr. Riggs never denied that he was in default under the sublease or challenged the amount owed. His only response to the eviction action was to file an Answer and Motion to Dismiss on the grounds that the plaintiffs were not registered to do business in Illinois. Thus, there was no litigation of any issue in the eviction action -- let alone protracted litigation -- before the petition to compel arbitration was filed and, as in *Distajo II*, no litigation

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[4] The Second Circuit in *Distajo II* also affirmed the District Court's ruling that if the eviction action was based solely on the franchisee's failure to pay rent under the sublease, as was the case with Mr. Riggs, DAI could not have waived its right to arbitrate other arbitrable claims. *Distajo*, 107 F.3d at 132 n.11; *See Doctor's Associates, Inc. v. Distajo, et al.*, 944 F.Supp. 1010, 1020 (D. Conn. 1996). This ruling, which Mr. Riggs has not challenged, also disposes of petitioner's waiver claim.

at all on the franchise agreement and fraud claims that Mr. Riggs later raised in his federal lawsuit. Petitioner does not, and cannot, contest these facts. Accordingly, under the undisputed facts and well settled law in all circuits, the Second Circuit was correct in concluding that DAI had not waived its right to compel arbitration under the FAA because in the eviction action DAI had not litigated any of the issues raised in Mr. Riggs's lawsuit. *Id.* at 133-34. *See, e.g., Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp.*, 67 F.3d at 25; *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d at 330-32; *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d at 1164-65.

Because there is an independent and adequate factual basis to support the Second Circuit's waiver decision that Mr. Riggs does not even challenge in his Petition (i.e., that there was no litigation of any issue in the Riggs eviction action before the petition to compel was filed) and because the Second Circuit in *Riggs* did not discuss the issue of prejudice, this case does not present the Court with an opportunity to address the issue of prejudice on which the Petition is based.

III. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS.

For the reasons set forth above, this case does not present the Court with an opportunity to address the purported conflicts on the issue of prejudice that the Petition presents. Moreover, the conflict that Mr. Riggs seeks to manufacture simply does not exist.

1. Petitioner first claims that the Second Circuit's decision that federal law governs whether DAI waived its right to compel arbitration under the FAA is in conflict with decisions of this Court, which allegedly hold that state law applies to such issues. Pet. 10-11. In fact, however, not one of the Supreme Court decisions relied upon by petitioner holds that waiver of rights under the FAA is an issue determined under state law. If anything, this Court's decisions applying the FAA support the Second Circuit's conclusion that federal law governs whether a party to a valid arbitration agreement has

waived its federal right to seek to compel arbitration under the FAA.

The Court has repeatedly recognized that the FAA constitutes "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). To ensure that valid arbitration agreements are enforced in state and federal courts, Congress enacted the FAA to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act..." *Id.* Thus, in *Moses H. Cone*, the Court held that "**as a matter of federal law**, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an **allegation of waiver**, delay or a like defense to arbitrability." *Id.* at 25 (emphasis added). The Court recently reaffirmed this holding from *Moses H. Cone* that federal law governs issues such as waiver. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1218 n.8 (1995).

Far from conflicting with the decision of the Second Circuit, each of the decisions cited by petitioner also supports the conclusion that federal law governs the waiver claim. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 862 (1984); *Perry v. Thomas*, 42 U.S. 483, 107 S. Ct. 2520 (1987); *Allied Bruce Terminix Co., Inc. v. Dobson*, 115 S. Ct. 834 (1995); *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996). These cases all hold that the FAA should be broadly interpreted to promote the strong **federal** policy favoring arbitration and that any state statute, common law or procedural rule that interferes with the enforcement of a valid arbitration agreement violates the Supremacy Clause. *E.g., Casarotto*, 116 S. Ct. at 1656. Thus, this authority confirms what this Court explicitly stated in *Moses H. Cone* -- federal law governs a claim that a party to a valid arbitration agreement has waived the federal rights that Congress established in the FAA. Any other rule would undermine Congress's

intent to make arbitration agreements enforceable as a matter of federal law. *Terminix*, 115 S. Ct. at 840.

Relying upon *Moses H. Cone* and other decisions from this Court, numerous federal courts, including the Seventh Circuit, have held that federal law governs the waiver of rights under the FAA. *Cabinetree v. Kraftmaid Cabinetry*, 50 F.3d 388 (7th Cir. 1995) (applying federal law and precedent to waiver defense); *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159 (5th Cir. 1987) (applying federal law to waiver defense); *Brown v. E.F. Hutton & Co., Inc.*, 610 F. Supp. 76 (S.D. Fla. 1985) (same); *Redshaw Credit Corp. v. Insurance Professionals, Inc.*, 709 F. Supp. 1032 (D. Kan. 1989) (same); *Realco Enterprises, Inc. v. Merrill Lynch, Pierce, Fenner & Smith*, 738 F. Supp. 515 (S.D. Ga. 1990) (same). As one noted commentator on the FAA has succinctly put it: "The substantive law of arbitration waiver is federal". Ian R. MacNeil, *et al.*, *Federal Arbitration Law* at 10:65 (1995). Accordingly, the Second Circuit's decision is not in conflict with any decision of this Court.

2. There also is no conflict between the Second Circuit's decisions in *Riggs* and *Distajo II* and the Seventh Circuit's opinion in *Cabinetree*.

First, *Cabinetree* is completely distinguishable from the facts of this case. In *Cabinetree*, the franchisee filed suit against the franchisor in state court. *Cabinetree*, 50 F.3d at 389. Rather than immediately petitioning to compel arbitration, as DAI did here, the franchisor in *Cabinetree* removed the case to federal court and then engaged in extensive discovery, obtaining thousands of pages of documents from the franchisee. After months of extensive and protracted litigation and after a trial date had been set, the franchisor moved to compel arbitration of the identical claims that the franchisor had been litigating for almost a year. *Id.* Based on these unique facts, the Seventh Circuit held, as a matter of federal law, that it would presume that the franchisor had waived its rights to compel arbitration, a holding that has absolutely no application to this case. *Id.* at 390.

Second, the Seventh Circuit in *Cabinetree* specifically held that in the absence of such extreme facts, a party's prior participation in litigation should not constitute waiver absent a showing of prejudice to the other party. *Id.* at 391. This holding is fully consistent with the Second Circuit's ruling in *Distajo II* that "waiver of the right to arbitrate occurs when a party 'engages in protracted litigation that results in prejudice to the opposing party.'" *Distajo*, 107 F.3d at 131. There are, therefore, no conflicts in the circuit courts for this Court to resolve.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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